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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Biennial Regulatory Review-Amendment of Parts 0,1,13,22,24,26,27,80,87,90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services	)	**WT Docket 98-20**
	)	
And	)	
	)	
Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers	)	**WT Docket No. 98-100**
	)	
And	)	
	)	
July 31, 1998 Letter from Personal Communications Industry Association Regarding Streamlining of Wireless Regulations	)	

To: The Commission

COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

RURAL TELECOMMUNICATIONS GROUP

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Dated: September 23, 1998

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SUMMARY

The Rural Telecommunications Group ("RTG") requests with one exception that the FCC adopt the recommendations made by the Personal Communications Industry Association ("PCIA") in its July 31, 1998 letter to the Wireless Telecommunications Bureau ("Bureau") regarding the streamlining, forbearance from enforcing, and elimination of duplicative, inconsistent, and unnecessary regulations pertaining to Commercial Mobile Radio Services ("CMRS"), Local Multipoint Distribution Service and other wireless telecommunications services. Streamlining the regulation of such services will remove many of the burdensome and unnecessary barriers which have hindered the entry, and continued presence, of providers into the wireless telecommunications market, particularly in rural areas.

The Commission's regulations dealing with the collection of ownership data exemplifies the type of FCC "underbrush" which hinders providers but does not help the FCC in conducting its regulatory duties. Streamlining these regulations as proposed will ease the regulatory burden on rural providers and serve as a catalyst for the entry of new participants into the wireless industry without inhibiting the Commission's information gathering abilities.

RTG, however, opposes the modification of Section 22.323 regarding incidental services. This provision provides carriers with a safe harbor ensuring protection from state rate and entry regulation. Accordingly, Section 22.323 should be retained.

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To: The Commission

COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") August 21, 1998 Public Notice (DA 98-1687) seeking comments on a July 31, 1998 letter from the Personal Communications Industry Association ("PCIA Letter" or "Letter") to the FCC's Wireless Telecommunications Bureau requesting that the Commission streamline or eliminate various wireless regulations. RTG, or its regulatory counsel, have previously filed

comments in the *ULS*[1] and *Wireless Forbearance*[2] proceedings supporting forbearance from enforcement or elimination of unnecessary regulation and the streamlining of remaining regulation.[3] RTG generally supports PCIA's proposal that the Commission streamline various wireless regulations. By eliminating unnecessary regulations and streamlining the remaining regulations, the Commission will encourage new entrants into the wireless industry and allow existing and new carriers to provide new and advanced services to rural and underserved areas. RTG, however, opposes PCIA's request to the extent that it requests elimination of certain requirements governing the provision of incidental communications service contained in Section 22.323.[4] These requirements serve a useful purpose by providing CMRS operators with a "safe harbor" ensuring federal jurisdiction over certain incidental wireless services whose jurisdictional status might otherwise be ambiguous.

In addition, on September 17, 1998, the Commission adopted a *Report and Order* in the *ULS* proceeding which addressed some of the issues raised in the PCIA Letter. The text of the *Report and Order* has not been released as of the time of the filing of these Comments.

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[1] *In re* Biennial Regulatory Review-Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Notice of Proposed Rulemaking,* WT Docket No. 98-20, FCC 98-25 (rel. March 18, 1998) ("*ULS NPRM*").

[2] *In re* Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 98-100, FCC 98-134 (rel. July 2, 1998) ("*Wireless Forbearance NPRM*").

[3] *See* Bennet & Bennet, PLLC Comments filed in WT Docket 98-20 on May 22, 1998 ("*ULS Comments*"); RTG Comments filed in Docket No. 98-100 on August 3, 1998 ("*Forbearance Comments*").

[4] *See* PCIA Letter, Appendix C-1.

Accordingly, RTG may supplement its comments to address certain issues raised in, but not resolved by, the *ULS* proceeding once RTG has reviewed the *ULS* Order.

I. STATEMENT OF INTEREST

RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Service ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service ("LMDS") licenses and intend to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. One of RTG's members also holds Wireless Communications Services ("WCS") licenses and intends to use WCS to provide advanced telecommunications capabilities and services in rural parts of Texas.

RTG has a vested interest in ensuring that regulatory burdens do not hinder the deployment of wireless services to rural areas. As noted above, RTG has been an active participant in this process and has filed comments supporting regulatory forbearance and streamlining in the *Forbearance* proceeding.

II. DISCUSSION

RTG generally supports the efforts of both PCIA and the Commission to streamline the Commission's rules regarding wireless telecommunications services. In the *ULS* and the

Forbearance proceedings, the Commission is examining ways to simplify applications to provide new wireless services, as well as requests for information during the term of service. In addition to filing pleadings in those and other proceedings, PCIA submitted a letter to the Bureau detailing those regulations which are inconsistent, outdated and administratively unnecessary and which, therefore, should be modified or eliminated.

With the exception of its opposition to the proposed modification of Section 22.323, RTG supports those proposed modifications as a means for stimulating competition in the wireless telecommunications market as well as encouraging the deployment of services to rural and underserved areas. In particular, the current ownership data collection rules place a significant burden on wireless providers while producing little public benefit.

A. PCIA's Proposed Regulatory Streamlining Will Promote Competition and Encourage the Deployment of New and Advanced Services

1. Wireless Services are Highly Competitive and Require Less Regulatory Oversight.

PCIA's proposal constitutes a "paring away" of much of the unnecessary regulatory "underbrush" for wireless services under Parts 22, 24, 27, 90 and 101 of the Commission's rules. The PCIA letter seeks to modify or eliminate those regulations which either provide for inconsistent treatment among the various types of wireless service providers, require more information than is necessary for application processing, conflict with the wireless application forms with respect to information requested, or which are based on a lack of competition in the wireless market. The streamlining of these regulations will further promote competition in the wireless market, as well as the local exchange and access marketplace, consistent with the

Commission's previously enumerated goal. [5] In addition, streamlining of these regulations will relieve some of the regulatory burden which current providers face, thereby encouraging further innovation and expansion by these providers and the deployment of advanced telecommunications services to all areas of the country, including rural and underserved areas, in furtherance of the objectives of Section 706 of the Communications Act of 1934, as amended.

The provision of wireless services is highly competitive and increasingly wireless carriers compete not only with each other but also with traditional wireline local exchange carriers ("LEC's"). The wireless industry has evolved and flourished in a deregulatory environment and should be allowed to continue to do so. Competition renders regulation largely unnecessary and, accordingly, such regulation should be minimized.

2. Regulatory Burdens Fall Most Heavily on Rural Providers and Deter Service in Rural Areas.

Because they are required to cover greater geographic distances but usually possess a smaller consumer base than urban providers, rural providers are far more sensitive to regulatory and cost hurdles than are their urban counterparts. Although unnecessary regulatory burdens pose a problem for all wireless providers, rural providers are particulary sensitive to these burdens and are more likely to forgo market entrance or the expansion of services due to significant regulatory hurdles. For those providers already in the rural market, continued burdensome regulation inhibits new innovation and growth and raises the cost to consumers. As RTG stated in its Forbearance comments:

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[5] *Hearing on Wirelesss Telecommunications Bureau Oversight Before the Subcomm. On Communications of the Senate Comm. On Commerce, Science and Transportation,* 105th Cong., 2nd Sess. At 2 (May 13, 1998).

> The cost of government regulation of CMRS carriers falls more heavily on rural wireless providers than on large wireless carriers. These rural wireless providers have neither the economies of scope to absorb such FCC-imposed costs nor a large subscriber base over which to spread the cost of compliance.[6] Therefore, rural wireless providers (both CMRS and non-CMRS) must raise their rates consistent with the compliance costs imposed upon them, much to the dissatisfaction of their subscribers and to the detriment of competition. The disproportionate cost will make it especially difficult for rural wireless providers to compete with the heavily subsidized landline carriers.

RTG Forbearance Comments at pp. 9-10 (footnote in original). Consequently, the Commission's streamlining of wireless regulations, as proposed in the PCIA Letter, will benefit rural wireless providers and encourage deployment to rural areas.

3. Streamlining Regulation Will Encourage the Deployment of Advanced Services Such as LMDS.

Streamlining and elimination of the wireless "underbrush" regulations will benefit the public by encouraging the continued growth of the wireless industry, and the deployment of such services as LMDS which is capable of providing competition in both the local telephony and video market. Such deployment is inexorably tied to Commission's removal of many resource-consuming and unnecessary regulations which serve as obstacles to wireless providers. As RTG pointed out in its Comments and Petition for Further Notice of Proposed Rulemaking filed in the *Forbearance* proceeding:

> In order to realize the hope of competition by LMDS in the local telephony and video distribution markets, the Commission must adopt the least burdensome, least costly

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[6] *See, e.g.*, June 16, 1998 Letter to William Kennard from RTG regarding 1998 regulatory fee assessment in the CMRS category. RTG characterizes the onslaught of fees, taxes, surcharges, and regulatory-related costs imposed on wireless carriers as "government profit chipping." Such fees, taxes and surcharges include disproportionately high annual CMRS regulatory fees and contributions to universal service funds from which wireless providers will never realistically receive support.

> regulatory structure possible for LMDS. By reducing the regulatory costs imposed on LMDS licensees, the FCC will be promoting competition among providers as well as encouraging the deployment of broadband services,[7] thus rendering forbearance in the public interest pursuant to Section 10(b) of the Act.[8]

LMDS licensees already face tremendous technical, financial and competitive hurdles in bringing LMDS service to market such as line-of sight (LOS) propagation limitations of the 28 GHz band and the short radius of hub spacing. Placing burdensome regulatory requirements on such providers or allowing unnecessary and confusing regulation to remain may deter potential LMDS providers from entering the market.[9] By eliminating unnecessary regulation, the Commission can encourage the deployment of this promising service.

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[7] In a recent statement regarding the implementation of section 706 of the 1996 Act, Chairman Kennard stressed the importance of bandwidth capacity as a means of bridging the "digital divide" between the information haves and have-nots. The Chairman stated, "Our goal is to promote the deployment of broadband services to all Americans, *including rural consumers, who might otherwise be left behind their urban counterparts in the receipt of such services....* We must continue to promote the deployment of bandwidth in a pro-competitive manner consistent with our historical national commitment to universal service." Statement of Chairman William E. Kennard Re Section 706 of the Telecommunications Act of 1996 and Bandwidth, Released April 22, 1998 (emphasis added).

[8] RTG Forbearance Comment, pp.5-6. The above arguments apply equally to wireless local loop and data service providers in general.

[9] Many of PCIA's recommendations look to the elimination of those regulations that are no longer necessary in light of changed regulatory schemes. For example, sections 101.53-101.55, which deal with transfer provisions and "trafficking" of authorizations, were implemented to prevent speculation when licenses were issued through competitive hearings and lotteries. However, the current use of auctions renders such regulations not only unnecessary but also burdensome. Such regulations conflict with the Commission's use of partitioning and disagregation and the policy that the marketplace should decide ownership of license areas.

B. The Commission's Ownership Data Collection Rules Are Onerous and Confusing And Should Be Either Streamlined or Eliminated.

While RTG generally supports the streamlining of the wireless regulations detailed in the PCIA Letter (with the exception of proposed streamlining of the incidental service rule discussed in Section C, *infra*), it is particularly concerned about the Commission's ownership data collection requirements. These requirements are particularly onerous.

As noted above, RTG's regulatory counsel filed comments in the *ULS* proceeding in which RTG's counsel expressed concern over the information required by proposed FCC Form 602. Specifically, the comments warned that the affiliate information disclosure (Item 12(a)) and the disclosure of tax identification numbers (Item 12(c)) were overbroad. RTG hopes that these problems raised in its comments were resolved in the *ULS* Order, however, in the event they were not, RTG may supplement its comments in the instant proceeding.

The Commission's ownership disclosure requirements in general are confusing and overbroad. For example, in addition to provisions identified in the PCIA Letter, RTG notes that subsection 1.2112(a)(3) of the rules is redundant and highly confusing. Section 1.2112 details the basic ownership reporting requirement. Unfortunately, subsection 1.2112(a)(3) is so poorly drafted and confusing that applicants are unable to comply with its requirements. In fact, in discussions with numerous members of the Commission's staff, RTG's counsel has not found a single individual who could explain the meaning of Section 1.2112(a)(3). More importantly, any information which subsection 1.2112(a)(3) might be interpreted to request would already be disclosed pursuant to subsection 1.2112(a)(1). Such regulations place unneeded regulatory burdens on providers and waste valuable resources.

RTG therefore urges the Commission to clarify, streamline or eliminate this subsection and to carefully examine its ownership data collection requirements.

C. Section 22.323 Serves and Important Purpose and Should Not Be Modified as Proposed

In its Letter, PCIA proposes eliminating the conditions placed on providers of incidental communications services pursuant to Section 22.323 of the rules.[10] Section 22.323 governs the provision of incidental communications services, such as fixed wireless services offered on an incidental basis to CMRS offerings. The Letter proposes elimination of the conditions that a provider of incidental services: (1) not increase costs and charges of subscribers who do not use such services; (2) not degrade the primary public mobile service offered; (3) notify the FCC about such service operations prior to their implementation. RTG opposes elimination of these requirements for the reasons set forth below.

Section 22.323 serves a unique and valuable purpose. Section 22.323 affords carriers offering fixed services over CMRS spectrum a "safe harbor" ensuring federal preemption of state rate and entry regulation of such services.

The issue of retention of Section 22.323 has been raised in WT Docket No. 96-6, the *CMRS Flexible Service* proceeding. In response to the *First Report and Order and Further Notice of Proposed Rulemaking,*[11] BellSouth Corporation ("BellSouth") filed a Petition for Partial Reconsideration or Clarification ("Petition") seeking the elimination of Section 22.323,

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[10] PCIA Letter, Appendix C-1.

[11] *Amendment of the Commission's Rules to Permit Service Offerings in the Commercial Mobile Radio Services,* WT Docket No. 96-6, *First Report and Order ("R&O") and Further Notice of Proposed Rulemaking ("FNPRM"),* 11 F.C.C.R. 8965 (1996).

and the Commission sought comment on this request.[12] One of RTG's members, Cellular Mobile Systems of St. Cloud General Partnership, LLP ("CMS"), filed comments on November 12, 1997 opposing elimination of this section. In its Comments, CMS correctly explained:

> [T]here are significant regulatory distinctions between fixed services provided on an incidental basis pursuant to Section 22.323, and those provided on a co-primary basis pursuant to Section 22.901. Most significantly, incidental services offered by CMRS providers fall within the statutory definition of "mobile service," and are subject to CMRS regulation. *FNPRM* at paragraph 48. As such, they are protected from burdensome state and local rate or entry regulation by Section 332 of the Communications Act of 1934, as amended ("the Act"). 47 U.S.C. Section 332. The issue of whether fixed services offered on a *co-primary* basis are deemed "mobile services" and therefore subject to the protection of Section 332 is currently pending before the Commission in the *FNPRM* phase of this proceeding [WT Docket No. 96-6]. Accordingly, the only way a CMRS provider can offer any type of fixed services on its CMRS frequencies with the assurance that it will not be subject to burdensome state or local regulation[13] is to offer such services on an incidental basis pursuant to Section 22.323.

CMS Comments, p. 4 (footnote in original).[14]

For these reasons, and those set forth more fully in the Comments of CMS and the reply comments of RTG, the Commission should take care to ensure that Section 22.323 does not get swept up in the clearing of "regulatory underbrush."

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[12] Public Notice released September 25, 1997 (DA-97-2083).

[13] CMS's concern with the prospect of state rate and entry regulation of fixed service offerings is not an idle one. With few exceptions, most states are anxious to regulate and tax wireless telecommunications providers. The current uncertainty regarding the federal regulatory classification of fixed services provided on a co-primary basis by CMRS licensees provides state regulators with just the opening they may be looking for to assert jurisdiction over wireless service offerings.

[14] For convenience, a copy of CMS's comments is attached. RTG filed reply comments in support of CMS's comments. A copy of RTG's reply comments is attached.

III. CONCLUSION

Wireless providers operate in a highly competitive and rapidly evolving environment. Most of the regulatory streamlining proposed by PCIA will promote competition and improved service without adversely impacting the Commission's limited oversight of the wireless industry. Many of these regulations are out-dated, inconsistent or confusing. Therefore, their streamlining will be in the best interest of all parties. Section 22.323, however, should be retained.

Respectfully submitted,

RURAL TELECOMMUNICATIONS GROUP

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In the Matter of	)	
	)	
Amendment to the Commission's Rules	)	
To Permit Flexible Service Offerings	)	**WT Docket No. 96-6**
in the Commercial Mobile Radio Services	)	

To: The Commission

COMMENTS OF
CELLULAR MOBILE SYSTEMS OF ST. CLOUD GENERAL PARTNERSHIP, LLP

Cellular Mobile Systems of St. Cloud General Partnership, LLP ("CMS"), by its attorneys, and pursuant to the invitation extended in the Federal Communications Commission's ("FCC" or "Commission") Public Notice released September 25, 1997 (DA 97-2083), hereby submits these comments in response to the Petition for Partial Reconsideration or Clarification ("Petition") filed by BellSouth Corporation ("BellSouth") in the above-captioned proceeding. BellSouth in its Petition asks the Commission to eliminate Section 22.323 of its rules and regulations which authorizes the provision of fixed wireless service offerings on an "incidental" basis. For the reasons discussed below, CMS urges the Commission to retain this rule provision.

Statement of Interest

CMS is a licensed provider of cellular telephone service in the St. Cloud, Minnesota Metropolitan Statistical Area. CMS also provides Basic Exchange Telephone Radio Service on an incidental basis pursuant to Section 22.323 of the Commission's rules. CMS is also considering utilizing its licensed cellular frequencies to provide a new incidental service offering,

a dual-use wireless service capable of being used in either a mobile or fixed mode, depending on the customer's location. CMS will therefore be directly affected by any elimination or revision of Section 22.323.

Discussion

BellSouth contends that, in permitting all commercial mobile radio service ("CMRS") providers to utilize their licensed spectrum for fixed service offerings in its *First Report and Order and Further Notice of Proposed Rulemaking*[1] in this proceeding, the Commission "inadvertently" retained Section 22.323. BellSouth bases this contention on the statement in the *R&O* that:

> [r]ather than continuing to define allowable fixed services in terms of whether they are "ancillary," "auxiliary," or "incidental" to mobile services, we conclude that our rules should more broadly allow fixed services to be provided on a co-primary basis with mobile services.

R&O, 11 F.C.C.R. at 8973. Plainly read, this statement clearly does not indicate any intention on the Commission's part to eliminate Section 22.323. It simply states that the Commission no longer wishes to *limit* the provision of fixed services to three regulatory classifications (ancillary, auxiliary, and incidental), and confirms the Commission's intent to "broaden[] the potential scope of fixed services that may be offered by CMRS providers"[2] by now permitting fixed services to be provided on a co-primary basis with mobile services. Indeed, the FCC's News

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[1] *Amendment of the Commission's Rules to Permit Service Offerings in the Commercial Mobile Radio Services,* WT Docket No. 96-6, *First Report and Order ("R&O") and Further Notice of Proposed Rulemaking ("FNPRM")*, 11 F.C.C.R. 8965 (1996).

[2] *FNPRM* at paragraph 48.

Release announcing the adoption of the *R&O* stated that "[t]he rules adopted today replace rules that *limited* certain CMRS providers to offering fixed services on an 'ancillary,' 'auxiliary,' or 'incidental' basis to mobile services." FCC News Release, Report No. DC 96- *///*, *FCC Votes to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, released June 27, 1996 (emphasis added).

Apart from its reliance on its contention that the Commission intended to eliminate Section 22.323 but inadvertently forgot to do so, BellSouth argues that the rule should be eliminated or modified due to its potential "chilling effect" on the provision of fixed services by Part 22 licensees. Specifically, BellSouth is concerned that CMRS licensees may be dissuaded from providing fixed services under Section 22.901 out of a fear that they may somehow be classified as providers of incidental fixed services under Section 22.323, and thereby be subject to the requirements that they notify the Commission prior to commencement of service and that such service be provided as an adjunct to the "primary" mobile service offering. The FCC's rules clearly state that a CMRS licensee may provide fixed service on a co-primary basis pursuant to Section 22.901[3], and that if it wishes to provide such service on an *incidental* basis it must specifically notify the FCC prior to commencement of the fixed service pursuant to Section 22.323. However, if the Commission nonetheless wishes to clarify that Section 22.323

[3] Section 22.901 by its terms governs only the provision of fixed services by *cellular licensees*. Similar provisions that relate to personal communications service ("PCS") and Part 90 licensees can be found in Sections 24.3 and 90.419 of the Commission's rules, respectively. For convenience, references in these comments to Section 22.901 should be read to encompass Sections 24.3 and 90.419 as well. In view of the inconsistent wording of these provisions which are intended to apply equally to all CMRS providers, CMS suggests that the Commission modify Sections 24.3 and 90.419 to either reference or read the same as Section 22.901. In addition, Section 22.901, 24.3 and 90.419 in aggregate do not encompass *all* CMRS services (*e.g.*, paging and air-ground radiotelephone service).

does not apply to any services offered pursuant to Section 22.901 as BellSouth suggests, CMS does not oppose such a clarification.[4]

The thrust of BellSouth's petition is that, in light of the changes brought about by the *R&O*, Section 22.323 no longer serves a useful purpose. What BellSouth fails to recognize is that there are significant regulatory distinctions between fixed services provided on an incidental basis pursuant to Section 22.323, and those provided on a co-primary basis pursuant to Section 22.901. Most significantly, incidental services offered by CMRS providers fall within the statutory definition of "mobile service," and are subject to CMRS regulation. *FNPRM* at paragraph 48. As such, they are protected from burdensome state and local rate or entry regulation by Section 332 of the Communications Act of 1934, as amended ("the Act"). 47 U.S.C. Section 332. The issue of whether fixed services offered on a *co-primary* basis are deemed "mobile services" and therefore subject to the protection of Section 332 is currently pending before the Commission in the *FNPRM* phase of this proceeding. Accordingly, the only way a CMRS provider can offer any type of fixed services on its CMRS frequencies with the

[4] BellSouth asks the Commission to "clarify that Section 22.323 does not apply to any services offered pursuant to Section 22.901 or the *Report and Order*." Petition at p. 3, n. 1. CMS does not oppose this request to the extent it seeks confirmation that a CMRS licensee offering fixed services *on a co-primary basis* pursuant to the terms of Section 22.901 cannot also be classified as incidental for those same services. However, to the extent that BellSouth's request could be interpreted as a request that *all* services that are *eligible* to be treated as co-primary services under Section 22.901 (*i.e.*, fixed wireless services) be regulated under Section 22.901 and not Section 22.323, notwithstanding the licensee's desire to take advantage of the regulatory protections offered by Section 22.323, CMS vigorously opposes such a request.

assurance that it will not be subject to burdensome state or local regulation[5] is to offer such services on an incidental basis pursuant to Section 22.323.

To obtain the benefits of this safe harbor protection, a provider of incidental fixed services must put up with additional regulatory restrictions. Unlike a co-primary fixed service offered pursuant to Section 22.901, an incidental fixed service offering is indeed "incidental." While under Section 22.901 a CMRS licensee may utilize its licensed frequencies to offer fixed service *exclusively*, a licensee offering fixed services on an incidental basis under Section 22.323 may only do so as an adjunct to its primary mobile service offering. Although the Commission has declined to place a quantitative limit on the amount of airtime that may be used to provide incidental service[6], its informal policy with respect to at least one category of CMRS has been that cellular frequencies be used "predominantly" for the provision of mobile cellular service.

Another restriction applicable to providers of incidental fixed services is the requirement that they notify the Commission prior to the provision of such services. *See* 47 C.F.R. Section 22.323(d). BellSouth claims that the notification requirement "serves no practical purpose." Petition at p. 3. To the contrary, this requirement serves a unique and valuable

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[5] CMS's concern with the prospect of state rate and entry regulation of fixed service offerings is not an idle one. With few exceptions, most states are anxious to regulate and tax wireless telecommunications providers. The current uncertainty regarding the federal regulatory classification of fixed services provided on a co-primary basis by CMRS licensees provides state regulators with just the opening they may be looking for to assert jurisdiction over wireless service offerings.

[6] *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC2d 769, 819 (1983) (rejecting a proposal by AT&T that it impose a 10% airtime limit on incidental services).

regulatory purpose. Because no Commission authorization is required to provide fixed services on CMRS frequencies, the only way for the FCC and the public to know whether a carrier is providing such services on a co-primary or an incidental basis (and therefore whether such carrier is complying with the relevant regulatory obligations for its specific service offering) is if the carrier files a notification that it is providing incidental service pursuant to Section 22.323(d). From the carrier's perspective, notification serves as official notice to both federal and state regulatory bodies that fixed service is being provided on an incidental basis and is therefore not subject to state rate or entry regulation.

Accordingly, although to the customer the fixed services provided on a co-primary or incidental basis may be similar if not identical, the regulatory "boxes" associated with each service are quite distinct, and from a CMRS provider's perspective, quite significant.[7] The regulatory distinctions between co-primary and incidental fixed services under Sections 22.901 and 22.323 serve a useful and important purpose and should be preserved. At a minimum, the Commission should continue to grandfather the regulatory treatment currently afforded licensees offering incidental fixed services as intended under the *R&O*.[8]

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[7] From the perspective of a provider of paging or air-ground radiotelephone service, the differences are critical. As noted in footnote 3, *supra*, the rules adopted by the Commission in its *R&O* to permit the provision of fixed services on CMRS frequencies on a co-primary basis do *not* by their terms apply to paging and air-ground radiotelephone service. Accordingly, for such carriers, the *only* way they can provide fixed service on their licensed paging or air-ground frequencies pursuant to the Commission's rules is do so on an *incidental* basis pursuant to Section 22.323.

[8] *See R&O* at paragraph 4 ("We do not intend to alter the regulatory treatment of licensees offering the ancillary, auxiliary, and incidental fixed services that have been offered by CMRS providers under our rules prior to this order."); *FNPRM* at paragraph 48 ("[W]e emphasize that

* * * * *

For the foregoing reasons, CMS respectfully requests that the Federal Communications Commission retain Section 22.323 of its rules, deny BellSouth's Petition and otherwise act in a manner consistent with the views expressed herein.

Respectfully submitted,

CELLULAR MOBILE SYSTEMS OF
ST. CLOUD GENERAL PARTNERSHIP, LLP

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Dated: November 12, 1997

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our decision to allow carriers to offer co-primary fixed services on spectrum allocated for CMRS does not alter in any way our regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules.").

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To: The Commission

REPLY COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"), by its attorneys, and pursuant to the invitation extended in the Federal Communication Commission's ("FCC" or "Commission") Public Notice released September 25, 1997 (DA 97-2083), hereby respectfully submits these reply comments in response to comments filed in response to the Petition for Partial Reconsideration or Clarification ("Petition") submitted by BellSouth Corporation ("BellSouth") in the above-captioned proceeding. These reply comments disagree with the commenters supporting elimination of Section 22.323 of the Commission's rules[1] and argue that BellSouth's Petition is not the proper vehicle for determining whether Section 22.323 should be modified or eliminated. At a minimum, Section 22.323 must be retained unless and until the Commission decides to amend its rules to regulate all fixed services provided over Commercial Mobile Radio Service ("CMRS") frequencies as it regulates mobile CMRS.

[1] 47 C.F.R. § 22.323.

I. STATEMENT OF INTEREST

RTG is an organized group of rural telephone companies whose purpose is to advocate on behalf of providers of rural wireless telecommunications services. Many of RTG's members provide or intend to provide fixed service offerings on an incidental basis using CMRS frequencies. RTG members will therefore be directly affected by the elimination or revision of Section 22.323.

II. DISCUSSION

A. Section 22.323's Authorization of the Provision of Fixed Services on an Incidental Basis Is Complementary to, Not in Conflict with, Primary Fixed Services Offered Pursuant to Section 22.901 and Must Not Be Eliminated

Of the five parties that submitted comments to BellSouth's Petition, only Cellular Mobile Systems of St. Cloud General Partnership, LLP ("CMS") looked beyond the semantics of the Commission's *R&O* to illuminate the true distinctions between the provision of incidental service pursuant to Section 22.323 of the Commission's rules, and the provision of fixed services pursuant to Section 22.901. RTG supports CMS's informed reasoning, which exposes the superficiality of the arguments made by BellSouth and its supporters. RTG agrees with CMS that the Commission has indicated no intent to eliminate the rights and obligations associated with the provision of fixed services on an incidental basis pursuant to Section 22.323.[2] CMS correctly instructs that there are significant regulatory distinctions between fixed services provided on an incidental basis pursuant to Section 22.323, and those provided on a co-primary basis pursuant to Section 22.901.[3] CMS also accurately explains that incidental services provided pursuant to Section 22.323 are free from burdensome state and local rate and entry regulation, which is the key defining difference between

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[2] Comments of CMS at 2.

[3] CMS Comments at 4.

incidental service provision and co-primary service provision. Insofar as these distinct benefits are inherent to, and incorporated within, the authority to provide services on an incidental basis pursuant to Section 22.323, and given the fact that the Commission did not address these specific benefits in the context of its discussion of the implications of adding the option of providing fixed services on a co-primary basis to the existing option of providing them on a secondary basis, it does not follow that the Commission "inadvertently" neglected to eliminate Section 22.323 upon the adoption of Section 22.901.

With the exception of two parties,[4] the commenters in this proceeding have blindly followed BellSouth's misconception of the interplay between a rule permitting carriers to provide fixed service on an incidental basis, and a rule permitting them to provide fixed service on a co-primary basis with mobile services. Contrary to their reading of these rules, Section 22.323 in no way "*limits* Part 22 licensees to providing fixed wireless services that are 'incidental' to the mobile services cellular carriers provide."[5] Rather, when the Commission amended its rules to permit all CMRS providers to utilize their licensed spectrum to provide fixed services on a co-primary basis with mobile services, the Commission was expanding the methods of providing telecommunications services.[6] That the amendment of Sections 22.901 (cellular services), 24.3 (PCS) and 90.419 (Specialized Mobile Radio ("SMR") services) of the Commission's rules permits the offering of fixed services on a co-primary basis is an expansion of choices, not a reduction in choices, is

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[4] CMS flatly disagrees with BellSouth's argument, and GTE Service Corporation ("GTE") argues for incidental service retention in the area of air-to-ground service.

[5] Comments of Cellular Telecommunications Industry Association ("CTIA") at 2 (emphasis added).

[6] *See generally In re* Amendment of the Commission's Rules to Permit Service Offerings in the Commercial Mobile Radio Services, *First Report and Order ("R&O") and Further Notice of Proposed Rulemaking ("FNPRM")*, WT Docket No. 96-6, (rel. Aug. 1, 1996).

evidenced by the Commission's statement that ". . . we conclude that our rules should more broadly allow fixed services to be provided . . . ."[7] Commensurate with its desire to expand the methods of service provision, the Commission amended Section 22.901(d) to read, in pertinent part: "Licensees of cellular systems may . . . provide fixed services on a co-primary basis with their mobile offerings. . . ."[8] Contrary to the majority of comments filed in this proceeding, nothing in the Commission's language indicates that it intended, as a corollary to permitting the provision of fixed services on a co-primary basis with mobile services, to eliminate or restrict the ability to provide fixed services on a secondary or incidental basis. GTE Service Corporation ("GTE") and CTIA each equate "flexibility" in the provision of service offerings to mean that the Commission must have intended to eliminate incidental service when it authorized the provision of fixed services on a co-primary basis with mobile services.[9] In particular, CTIA states:

> The Commission clearly intended that all CMRS providers benefit from its new flexible use policies.[] Section 22.323 is inconsistent with the modified Section 22.901(d).[10]

Similarly, GTE states that it:

> agrees with BellSouth that retaining the incidental services rule would possibly eliminate some of the flexibility the Commission hoped to create for cellular providers in this proceeding.[11]

This interpretation is at odds with the concept of "flexibility," which would presumably be best accomplished by the existence of more, not fewer, choices regarding the manner in which a service

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[7] *R&O* at ¶ 11(emphasis added).

[8] 47 C.F.R. § 22.901(d) (emphasis added).

[9] Comments of GTE at 3; Comments of CTIA at 4-6.

[10] CTIA Comments at 5 (emphasis in original; footnote omitted).

[11] GTE Comments at 3.